CR.A 665/1995 1 Judgment

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 665 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

KISHORBHAI BHABUTMAL SHAH - Opponent(s)

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Appearance :

MR. K.C. SHAH, LD. APP for Appellant.

MS. BANNA DATTA FOR MR AR SHAIKH for Respondent.

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CORAM : HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 23/08/2005

ORAL JUDGMENT

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1.The Appellant – State of Gujarat has preferred this appeal under section 378 of the Code of Criminal

Procedure challenging the order of acquittal dated 21-1-1995 passed by the learned Chief Judicial Magistrate, Himatnagar in Criminal Case No. 646 of 1992, acquitting the accused of the charges under section 2(1) (a)(f), 7(1)(5), Rule 44 and 16(1)(a) of Prevention of Food Adulteration Act, 1954. This Court vide order dated 14-3-1996 granted leave and admitted the appeal.

2. The case of the appellant in short is that the original complainant Food Inspector on 18-9-1991 at about 4.00 O' clock in the evening visited the shop of the accused along with Mr. P.J. Bodar,his helper at Station Road, Himatnagar. The vendor's shop was running in the name of Shah Babulal Deepchand. The panch witness Sundarmal Bilandmal Shyamlani had also accompanied the complainant. At that time one Kishorbhai Bhabutmal Shah was present in the shop and was selling various provisions. This Kishorbhai Bhabutmal Shah is named as accused vendor in this case. After introducing himself as Food Inspector the complainant demanded license from the aforesaid Kishorbhai Bhabutmal Shah, who could not produce license for running shop and assured that license will be shown to him later. A tin containing 4 kgs black pepper was lying in the shop. The Food

Inspector demanded 600 grams of black pepper for analysis from the accused and issued notice under Rule 12 in Form VI intimating his intention to send the sample food article for the purpose of analysis. The panch and the accused have signed office copy of the noting under Rule 12, same is exhibited as exhibit-12 on record of the case. The 600 grams of black pepper at the first instance was taken in a clean polythene bag. The complainant mixed this 600 grams black pepper in the very bag of polythene and divided the entire sample food article of black pepper in to three equal parts of 200 grams each and collected it in a clean dried, dehumidified, transparent glass bottles. The glass bottles were fastened with air tight corks so as to prevent moisture or any other particles from entering into it. The Food Inspector thereafter affixed proper seal, signature and particulars of Local Health Authority and Code number etc. as required under law and followed the procedure scrupulously for sealing the sample food article. The Food Inspector paid price of Rs.33=00 for the black pepper purchased and received receipt thereof from the vendor. The cash memo is exhibited at exhibit-15 on record. The panchnama was also drawn of the incidence of

collecting the sample. On the next day i.e. on 19-9-1991 one sealed bottle of sample food article was sent to the Public Analyst, Rajkot. The impression of seal was sent separately by registered post A.D., as required under law. The remaining 2 parts of the samples were sent to Local Health Authority in compliance with the provisions of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the “Act”). The acknowledging receipt of sample are produced on record. The report of the Public Analyst recorded the finding that mineral oil was present in the sample food article and therefore there was breach of section 2((1) (a)) (f) and Rule 44 AAA of the Prevention of Food Adulteration Rules, 1955 (hereinafter referred to as the “Rules). The report of Public Analyst with the relevant papers were submitted to Local Health Authority for obtaining consent for lodging prosecution. The consent was given by the Local Health Authority and thereafter, the complaint came to be lodged. After the complaint was lodged, notice under section 13(2) came to be issued to the accused for affording an opportunity to have the remaining food sample tested by the Central Food Laboratory. The accused seems to have availed opportunity of having the sample tested at

the end of Central Food Laboratory. The report of Central Food Laboratory also intimated that due to presence of mineral oil found in the sample food article of black pepper, it was adulterated, and the trial court, therefore, confronted the accused with the charges and recorded plea of accused denying the same and proceeded further in the matter.

3. The trial court has framed two issues, namely (1) whether the prosecution proves beyond doubt that the accused has committed offence under section 2 (1)(a) and Rule 44 AAA of the PFA Act and Rules under section 7(1)7(5) and 16 (1)(a) on his selling the sample black pepper to the Inspector on 18-9-1991 at 16.00 hours; (2) what order.

   The first issue is answered in negative and second as per the order.

4. After discussing the documents and evidence on record learned trial court has come to the conclusion that the prosecution has failed in establishing its case beyond doubt and therefore, the benefit of doubt is accorded to the accused and the order of acquittal is recorded on 21-1-1995. The same is under challenge in this appeal.

5. Learned APP Shri. K.C. Shah has vehemently urged

that as the adulteration of black pepper is proved on the basis of conclusive evidence in form of the report from Central Food Laboratory, the trial court ought not to have recorded the acquittal impugned in this appeal. Shri. Shah has further submitted that the reasoning adopted by learned trial court for arriving at the conclusion of acquittal is untenable in eye of law. The trial court has erroneously come to the conclusion that the testimony of the Food Inspector was not believable. The trial court ought to have appreciated the fact that the Food Inspector – complainant in the official capacity has collected sample food article and in absence of allegation of any personal animosity his testimony could not have been discarded as it is done in the present case. The trial court, therefore, patently erred in acquitting the accused by giving benefit of doubt and therefore, the order impugned deserves to be quashed and set aside and as the adulteration is proved on the basis of conclusive evidence in the form of Central Food Laboratory report the accused deserves to be convicted and punished with appropriate punishment. Shri. Shah has further submitted that, the absence of any reference to the Central Food Laboratory report in the charge and the

trial court's omission in confronting the accused with substance of the Central Food Laboratory report may not be considered to be a vital infirmity so as to sustain the order of acquittal as submitted by learned counsel for the respondent. Shri. Shah has submitted that non mentioning of the report of the Central Food Laboratory in the charge at the best could be said to be a procedural infirmity which can well be cured during the trial or even after the trial at the appellate stage. More over the infirmity in not confronting the accused with the substance of the report of the Central Food Laboratory and not calling upon him to explain the circumstances noted against him can well be cured even at this stage in this appeal also. Shri. Shah has further submitted that in the alternative, if these two infirmities are considered to be vital then the matter deserves to be remanded back to the trial court for curing the infirmity rather that maintaining the impugned order of acquittal.

6. Ms. Datta appearing on behalf of the respondent accused has urged that this being an acquittal appeal this court may not interfere with the order of acquittal, unless & until it is patently established by the appellant that the order of

acquittal is perverse and illegal and has resulted into serious miscarriage of justice. In absence of any such submission on behalf of the appellant, merely on the possibility of curing the infirmities the accused- respondent can not be subjected to rigor of fresh trial or re-trial as submitted by Shri. Shah. Ms. Datta has further submitted that this being acquittal appeal respondent has also right to support the order of acquittal on the reasoning different than that adopted by the trial court for recording the acquittal. Ms. Datta has submitted that a close perusal of the evidence on record and especially the rojkam, would clearly raise a doubt about the satisfaction of the trial court in respect to the seal of the sample which was being sent to Central Food Laboratory. It was the duty cast upon the trial court under the statute to verify the condition of sample which was being sent to the Central Food Laboratory. The language of the statute is unequivocally clear on this point. If it is shown that the trial court has omitted in recording its satisfaction about the condition of sample which is being sent to the Director of Food Laboratory then the order of acquittal need not be disturbed as the benefit of doubt deserves to be

accrued to the accused respondent.

7. As it can be shown from the record that the trial court not only had to see that the sample is sent under its own seal but before sending sample the trial court was required to record its satisfaction about the condition of the sample. That condition seems to have been not fulfilled in th present case and therefore, even on that count this court sitting in appeal may not disturb the acquittal recorded by the trial court. Ms. Datta has further submitted that the trial court has rightly come to the conclusion that the prosecution has failed in establishing its case beyond doubt in as much as the vendor has not been established to be the owner of the shop. The name of the vendor under memorandum form vii has therefore been left blank. This fact coupled with the fact that the certificate brought on record during the cross examination which was originally collected by the Food Inspector at exhibit-30 also do not disclose the name of the present respondent as vendor. These all facts should be considered sufficient to show that the prosecution has not established its case beyond reasonable doubt and therefore, the benefit of doubt deserves to be given to the accused and in this

acquittal appeal the order of acquittal need not be disturbed.

8. This Court has perused the record & proceedings and the evidence available and heard learned counsels at length. This appeal deserves to be disposed of only on the ground that the report of Central Food Laboratory has not been pressed into service either by the prosecution or by the trial court, which should have been the only evidence of adulteration superseding the evidence in the form of Public Analyst report. The established principle of law today is that when the report from Central Food Laboratory is available on record the report of Public Analyst should stand superseded. In the instant case though the report of Central Food Laboratory was on record, the accused was not confronted with the same either in the charge or while taking further statement under section 313 of the Code of Criminal Procedure. The submission of Shri. Shah that this being an infirmity curable can not be accepted in view of the fact that this is not the case of only defective charge. It is the foundation of the trial which seems to be defective in view of the fact that the trial and the case of the prosecution was required to be built on the

proof of adulteration which was available only in form of Central Food Laboratory report. As that report is not made basis of the trial, it can well be said that the accused was deprived of an opportunity of being confronted with the essential material against him.

9. It would be expedient to refer to the observation of the Apex Court in case of BHIM SEN Vs. THE STATE OF PUNJAB, reported in 1951-1975 PFA Cases, S.C. pg. 187. The Apex Court has in this case observed as under:-

5. It is apparent from the record of the case that the conviction of the appellant suffers from a serious infirmity and it is impossible to sustain it. It is indeed surprising how the attention of the Chief Judicial Magistrate or the Additional Sessions Judge or the High Court was not drawn to this patent infirmity which stares in the face. The charge against the appellant was that on 11th July, 1968 he sold to the Food Inspector 1800 mili litres of "aerated water" which was found on analysis to have sucrose content of 0.38 per cent as against the prescribed standard of 5 per cent and thereby committed an offence punishable under s. 7 read with s. 16 of the Act. The basis of the charge was that the sucrose content of "aerated water" sold by the appellant should have been at lest 5 per cent whereas in fact it was very much less, namely, 0.38 per cent according to the report of the Public Analyst and nil according to the report of the

Director, Central Food Laboratory. But, if we look at item A.01.01 in Appendix B of the Prevention of Food Adulteration Rules, 1955, it is clear that this postulate on which the charge is based, namely, that sucrose content of “aerated water” should necessarily be less than 5 per cent is incorrect. This item lays down the standard of quality of carbonated water which is the same as aerated water and it says that carbonated water may contain any of the ingredients there enumerated, singly or in combination and one of those ingredients is sugar. It is, therefore, obvious that “aerated water” may contain sugar or may not contain sugar and if it does not contain sugar, it wold not in any way detract from the standard of quality prescribed for “aerated water” in this item. It is only the proviso to this item which requires that the sucrose content shall not be less than 5 per cent, but that is in case of “sweetened carbonated water.” If what is sold is “sweetened aerated water”, then it must contain sucrose of not less than 5 per cent or else it wold not be in conformity with the standard of quality prescribed by this item and would have to be regarded as adulterated. But this requirement of sucrose content being not less than 5 per cent does not apply where what is sold is not sweetened “aerated water” but merely “aerated water” which may or may not contain sugar. Here in the present case, the charge against the appellant was not that he sold “sweetened aerated water” nor was any evidence led on behalf of the prosecution to show that what was sold by the appellant was “sweetened aerated water”. The charge against the appellant mentioned

only “aerated water” and nothing more than and that was also the evidence on behalf of the prosecution. Even in the examination of the appellant under s. 342 of the Code of Criminal Procedure it was not suggested to him that he sold “sweetened aerated water”. The case which he was called upon to meet was only in regard to sale of “aerated water”. It was, therefore, entirely immaterial that the sample of aerated water sold by the appellant contained only 0.38 per cent sucrose, or for the matter of that, no sucrose at all. The so called deficiency in sucrose content did not involve any violation of the standard of quality prescribed for aerated water in Item A.01.01 and the sample of “aerated water” sold by the appellant could not be condemned as adulterated. The Chief Judicial Magistrate, the Additional Sessions Judge and the High Court were, therefore,clearly in error in convicting the appellant of the offence under s. 7 read with s. 16 of the Act.

6. Before we part with this case, we must refer to one other contention urged on behalf of the respondent in a desperate attempt to sustain his conviction. That contention was that according to the certificate of the Director, Central Food Laboratory, which superseded the report of the Public Analyst, the sample of “aerated water” sold by the appellant contained non-permitted coal tar dye and consequently, it was adulterated and the appellant was rightly convicted for selling it.

7. But the short answer to this contention is that

it did not form the subject mater of the charge against the appellant nor was it put to him in his examination under s. 342 of the Code of Criminal Procedure, and it is, therefore, not open to the State to urge this ground for the first time at this stage in order to support the conviction. “

10. This fact needs to be viewed in light of the fact that the trial court has not recorded anywhere its satisfaction about the seal on the sample food article which was being sent to Central Food Laboratory. Had the trial commenced and conducted on the basis of the Central Food Laboratory report, as it was the only evidence of adulteration, then, the court would not have missed its duty in ascertaining and recording the condition of seal on the sample. Unfortunately the satisfaction in respect of condition of sample does not seem to have been recorded anywhere either in the rojkam or in the application or in the order of the court while sending the sample to Central Food Laboratory.

11. The mandatory provisions contained in section 13 (2B) makes it incumbent upon the trial court to first ascertain that the mark and seal or fastening as provided in clause (b) of sub section (1) of section 11 are intact and the signature or thumb impression, as the case may be, is not tampered

with, and dispatch the part or, as the case may be, one of the parts of the sample under its own seal to the Director of the Central Food Laboratory who shall thereupon send a certificate to the court in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of the analysis. In the instant case the record as it is stated herein above does not show the recording of the satisfaction by the trial court in respect of sample that was being sent to the Central Food Laboratory for analysis. This fact as it is stated herein above coupled with the fact that there is an omission on the part of the Food Inspector in mentioning the name of the vendor and the absence of the accused's name as owner in the document at exhibit-30 would be sufficient to come to the conclusion that the prosecution has failed in establishing its case beyond doubt.

12. The submission of the learned APP for the appellant that the matter may be remanded is not acceptable, in view of the fact that the infirmity narrated herein above is very vital and the remand after lapse of this many years would not be in the interest of justice.

13. In view of the aforesaid, this Court, though may

not be in complete agreement with the reasoning of the trial court, is of the view that the order of acquittal does not call for any interference in this appeal.

14. In the result the acquittal appeal fails, and the same is dismissed.

[S.R. BRAHMBHATT, J]

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